

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KENNETH MEEK)	
Claimant)	
VS.)	
)	Docket No. 216,078
KEY INDUSTRIES, INC.)	
Respondent)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the October 2, 2000, Award of Administrative Law Judge Steven J. Howard. Claimant was limited to his functional impairment after the Administrative Law Judge found claimant had been released to full duty with respondent and actually performed that duty for several months before his termination in September of 1997. The Administrative Law Judge found, as this termination was unrelated to his injuries, claimant should be limited to his functional impairment.

Additionally, the Administrative Law Judge found claimant had removed himself from the work force and had ceased looking for employment in 1998 upon the advice of his social worker. Oral argument before the Board was held on April 25, 2001.

APPEARANCES

Claimant appeared by his attorney, Carlton W. Kennard of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Leigh C. Hudson of Fort Scott, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations contained in the Award. At oral argument, the parties clarified that the discovery deposition of Kenneth Meek taken April 20, 1998, is not a part of the record.

ISSUES

What is the nature and extent of claimant's injury and/or disability? This issue encompasses claimant's effort to retain his employment with respondent as well as his efforts to obtain additional employment after his termination from respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds the Award of the Administrative Law Judge should be affirmed.

Claimant worked for respondent as a laborer, performing several different activities. These activities included pushing garment carts, cleaning and sweeping, and sorting boxes of various sizes. Claimant also occasionally unloaded garments from trucks and checked inventory. Claimant's job duties required repetitive use of his hands and upper extremities. While working for respondent, claimant developed problems with his bilateral upper extremities, including both wrists and elbows. Claimant was diagnosed with carpal tunnel syndrome and possible tennis elbow. He came under the care of orthopedic surgeon John M. Veitch, M.D., of Joplin, Missouri. Claimant underwent a right carpal tunnel syndrome release on July 16, 1996, and a left carpal tunnel syndrome release on August 12, 1996. Claimant showed improvement after the surgeries, although he did have complaints in his forearms and elbows and, on one occasion, in his shoulder. Claimant received no treatment for his shoulder.

Claimant was returned to light duty shortly after the second surgery and worked light duty until February 10, 1997. At that time, he was returned to full duty with respondent.

Claimant was required to put carts of product in a particular order and keep a log book of those carts. The product was then used by packers to fill orders. Claimant was aware that the carts were to be kept in a certain numerical order and a record in the log book was to be maintained. Claimant had a meeting with Jeffery Hill, respondent's distribution manager, in May 1997, about the importance of keeping the carts in order.

There had earlier been some complaints about the carts being placed in improper order which did effect the packers' ability to perform their jobs. Also, at some time prior to September 2, 1997, there was a problem noted regarding claimant's notations in the log books.

On September 2, 1997, Mr. Hill found that the carts were in an order different than that normally allowed. Mr. Hill checked the log books, finding that they also were not properly maintained. Due to the fact claimant had been counseled about the importance of keeping the carts in order and the importance of keeping an accurate log book, respondent considered this problem to be insubordination. Respondent either felt claimant did this intentionally or with an unacceptable level of indifference to his job duties. Claimant was terminated on September 2, 1997.

The Administrative Law Judge, in reviewing the record, found that claimant had performed his job duties in an inappropriate manner and the termination was not related to his injuries. He felt claimant could have performed those job duties properly had he put forth the effort to do so. As a result, the Administrative Law Judge limited claimant to his functional impairment.

After being terminated from respondent, claimant attempted to collect unemployment benefits, but was unsuccessful.

Claimant, upon the advice of his social worker, elected to pursue Social Security benefits and was awarded same in 1998. Claimant also testified that, after talking to his social worker, he ceased looking for employment of any kind. At the time of claimant's deposition on July 13, 2000, he was not seeking employment. Claimant testified that he was told by Bernard Abrams, M.D., and by a mental health doctor, who was unidentified, not to return to work.

Claimant was examined by Dr. Abrams, a neurologist, on April 27, 1998. Dr. Abrams felt claimant needed additional surgeries to resolve his carpal tunnel and possible de Quervain's complaints. Claimant, however, refused those surgeries. With the exception of recommending claimant undergo additional surgery, Dr. Abrams did not restrict claimant from employment. He did, however, recommend claimant avoid work requiring repetitive use of his upper extremities.

Claimant's treatment with Dr. Veitch continued through August 12, 1998. Dr. Veitch felt claimant had a 12 percent impairment to the body as a whole stemming from the right and left carpal tunnel syndrome and possible right and left lateral epicondylitis. He also felt claimant would benefit from follow-up surgery to remove scar tissue which had

developed after his carpal tunnel surgery. However, as noted, claimant refused the recommended medical treatment.

In workers compensation litigation, the burden is on claimant to prove his entitlement to the benefits claimed by a preponderance of the credible evidence. See K.S.A. 1996 Supp. 44-501 and K.S.A. 1996 Supp. 44-508(g). While not cited by either party or the Administrative Law Judge, this case is akin to Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991). In Perez, the claimant was returned to work with Excel Corporation but, after missing numerous days, was terminated for excessive absenteeism. After his termination, Perez argued that his work-related injuries prevented him from engaging in any type of employment. The appellate court, finding claimant, in Perez, capable of returning to work and that he had lost his job as a result of the absenteeism, limited his award to his demonstrated functional impairment. See also Ramirez v. Excel Corp., 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* ___ Kan. ___ (1999).

In this instance, claimant showed the ability to return to work for respondent at a comparable wage. This termination resulted not from claimant's work-related injuries, but instead from his poor work performance over the several months after his return to his regular duties. Claimant did not testify that his inability to perform the job was the result of his work-related injuries. Claimant instead argued that his work problems were, in some way, related to actions of his fellow employees. He argued that the packers apparently put the carts in the wrong places and that perhaps another employee was, in some fashion, mismarking his log book. Those allegations were not supported by the record.

The Appeals Board finds claimant's termination on September 2, 1997, after returning to his regular duties with respondent at a comparable wage, was the result of claimant's failure to perform his job satisfactorily. His termination was not related to his injuries suffered while he was employed with respondent. Therefore, based upon Perez and Ramirez, the Appeals Board finds this claimant should be limited to his functional impairment. As the parties stipulated that claimant is entitled to a whole body functional impairment of 12 percent, the Appeals Board affirms the Administrative Law Judge's Award granting claimant a 12 percent impairment to the body as a whole for the injuries suffered while employed with respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated October 2, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Pittsburg, KS
Leigh C. Hudson, Fort Scott, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director